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No. 82-1776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

S. J. GROVES & SONS COMPANY, a corporation,
Appellant,

vs.

THE STATE OF ILLINOIS, Acting through its Division of Highways of the Department of Transportation,
Appellee.

On Appeal from the Supreme Court of Illinois

MOTION TO DISMISS

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QUESTION PRESENTED

Whether this appeal should be dismissed because no substantial federal question is presented?

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In The

Supreme Court of the United States

October Term, 1982

S. J. GROVES & SONS COMPANY, a corporation, *Appellant,* vs. **THE STATE OF ILLINOIS, Acting through its Division of Highways of the Department of Transportation,** *Appellee.*	**On Appeal from the Supreme Court of Illinois**

MOTION TO DISMISS

ARGUMENT

THIS APPEAL SHOULD BE DISMISSED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

A.

The Illinois Supreme Court's Decision Rests Upon An Independent And Adequate State Ground.

There is no federal constitutional right to sue a state. Indeed, it has long been accepted without question that neither a state nor the United States could be sued as a

defendant in any court in this country without their consent. *Cunningham v. Macon & Brunswick Railroad*, 109 U.S. 446 (1883). In *Palmer v. State of Ohio*, 248 U.S. 32 (1918) this Court reiterated that "[t]he right of individuals to sue a state, in either federal or a state court, cannot be derived from the Constitution or laws of the United States. It can only come from the consent of the state." (*Id.* at 34). Implicitly recognizing that if Illinois retains its sovereign immunity no substantial federal question is presented in this case, plaintiff premises all of its constitutional arguments upon a purported "constitutional waiver" of immunity in the 1970 Illinois Constitution. However, the question of whether Illinois has waived its sovereign immunity—a point assumed by plaintiff without argument in its Jurisdictional Statement—is purely a question of State law. Since the Illinois Supreme Court has ruled that this State retains its sovereign immunity, no substantial federal question is presented.

Inexplicably, plaintiff has overlooked the fact that the 1970 Illinois Constitution authorized the General Assembly to adopt legislation retaining Illinois' immunity and such legislation was enacted. Article XIII, section 4 of the 1970 Illinois Constitution provides *"Except as the General Assembly may provide by law*, sovereign immunity in this State is abolished." (emphasis added) This provision became effective on January 1, 1972. *See*: Transition Schedule, § 1(e). Effective concurrently with this provision, the legislature adopted P.A. 77-1776, which mandates that the State shall never be made a defendant or party in any court, except as provided in the Court of Claims Act. Ill.Rev.Stat., 1981, ch. 127, par. 801. Thus, it is quite clear that Illinois retains its sovereign immunity under this legislation.

Moreover, the Illinois Supreme Court has frequently construed this provision of the Illinois Constitution and the Court of Claims Act and has held that Illinois retains its sovereign immunity under the 1970 Illinois Constitution. *See: Seifert v. Standard Paving Company*, 64 Ill.2d 109, 114, 355 N.E.2d 537 (1976); *Williams v. Medical Center Commission*, 60 Ill.2d 389, 394-95, 328 N.E.2d 1 (1975). It is well settled that the decision of the highest court in a state on a question of state law is conclusive. *Wilson v. North Carolina ex rel. Caldwell*, 169 U.S. 586, 18 S.Ct. 435 (1897).

Therefore, the Illinois Supreme Court's decision construing the Illinois Constitution as not effecting a waiver of this State's immunity is not subject to review by this Court, since it presents no federal question. *Cf. Douglas v. Noble*, 261 U.S. 165, 43 S.Ct. 303 (1922). Since the Illinois Supreme Court's decision in this case rests upon an independent and adequate state ground, this appeal must be dismissed. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566, 53 L.Ed.2d 965 (1977).

B.

Since Plaintiff Did Not Assert That The 1970 Illinois Constitution Abolished Sovereign Immunity In The Courts Below, This Point Is Waived And Should Not Be Considered.

The sole argument which plaintiff now makes—that sovereign immunity was abolished by the 1970 Illinois Constitution—is raised for the first time before this Court. It is true that plaintiff did argue below that the Court of Claims Act was unconstitutional because Illinois does not enjoy sovereign immunity. However, the reasons underlying plaintiff's argument in the courts below were: (1) there was no sovereign immunity at common law with

respect to contract actions, and (2) by authorizing state departments to enter into contracts the State had impliedly waived its immunity. These arguments were summarized by the plaintiff in its Reply Memorandum in the Circuit Court, where it stated,

> The preceding two arguments show that sovereign immunity does not apply to contracts signed by the State, both because sovereign immunity never applied to contracts at common law, and because the signing of a contract in and of itself is a business/proprietary act that waives sovereign immunity. Therefore, since sovereign immunity does not apply to contracts, the Illinois Court of Claims Act deprives Plaintiff of property without due process of law, in violation of both the Illinois and United States Constitutions, since it does not allow the plaintiff the right to sue for breach in a court of law.

The foregoing arguments were the only ones advanced by the plaintiff in support of its position in both the Illinois Appellate and Illinois Supreme Courts. Plaintiff has never before argued that sovereign immunity was abolished by the Illinois Constitution of 1970 and should not be permitted to raise this issue for the first time here. *See*: Appellant's Brief in *Groves v. State of Illinois*, No. 81-349 at pp. 11-12; Appellee's Brief in *Groves v. State of Illinois*, No. 56169 at p. 23.

This Court has consistently refused to decide federal constitutional issues which had never been raised, preserved, or passed upon by the courts below. *Tacon v. Arizona*, 410 U.S. 351, 352, 35 L.Ed.2d 346 (1973); *Moore v. Illinois*, 308 U.S. 786, 799, 33 L.Ed.2d 706 (1972); *Cardinale v. Louisiana*, 394 U.S. 437, 438, 22 L.Ed.2d 398 (1969). Since all of plaintiff's federal constitutional claims are premised upon a construction of the State Constitu-

tion which was not advanced in the State courts, this point was waived and cannot now be relied upon to reverse the decision of the Illinois Supreme Court.

This conclusion is supported not only by general principles of waiver, but also by principles of comity. In *Cardinale v. Louisiana, supra,* this Court explained,

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds (cit. omitted), they should be given the first opportunity to consider them.

394 U.S. 439.

If the plaintiff wanted the Illinois Supreme Court to reconsider its prior decisions in *Williams* and *Siefert,* it should have argued to that Court that these decisions were erroneous and should be overruled. Since plaintiff did not make this argument in the courts below, the point was waived and should not be considered by this Court.

CONCLUSION

For the reasons stated above, this appeal should be dismissed.

Respectfully submitted,

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